No. 22,696

In the

United States Court of Appeals

for the Ninth Circuit

SOUTHWEST FOREST INDUSTRIES, INC.,
Appellant,

vs.

WESTINGHOUSE ELECTRIC CORP.,
Appellee.

Reply Brief of Appellant Southwest Forest Industries, Inc.

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THE STATEMENT OF CASE SUBMITTED BY WESTINGHOUSE CONTAINS PURPORTED FACTS NOT CONTAINED IN THE RECORD

The Court should be ever mindful that Southwest was the one who purchased the defective steam turbine generator unit sold by Westinghouse for $1,137,123.00 and that Southwest is the injured party and not Westinghouse.

Westinghouse has very cleverly and conveniently slanted its Statement of the Case by including therein many irrelevant and incorrect matters, which are not set forth in or supported by the record and are in direct violation of Rule 28(a)(3), *Federal Rules of Appellate Procedure,* which states in part: "There shall follow a statement of the facts relevant to the issues presented for review, *with appropriate references to the record* (see subdivision (e))." (Emphasis added)

Southwest feels it has no alternative but to point out some of the major items submitted by Westinghouse in its Statement of the Case which are either incorrect or without support in the record.

The following statement by Westinghouse (Appellee's Brief, p. 11) is gratituously made without the benefit of citation either to the Appeal Transcript or the Transcript of Proceedings, and Southwest submits that this statement is not in fact in the record:

> Had the court then known what everyone later learned, *i.e.*, that Southwest's own executives had always considered the applicable warranty to be the Westinghouse warranty and had in fact submitted the Westinghouse warranty to former counsel for an opinion when the matter first came up (a fact unknown to Southwest's trial counsel until Westinghouse discovered such proof in Southwest's records during trial), it undoubtedly would have denied the motion and the litigation would have been terminated at that point.

Westinghouse informs the Court on p. 12 of its Brief that: "Amazingly, this first document [invitation to bid which was sent by Rust to Westinghouse on May 3, 1960] is not even mentioned in Southwest's opening brief." The Court will find on page 2 of Southwest's opening brief that Southwest specifically and clearly mentioned the invitation to bid sent by Rust to Westinghouse on May 3, 1960.

Contrary to Westinghouse's assertion, there is no testimony in the record to show that the Copy 25 was sent by Westinghouse to Rust or that Rust received the same from Westinghouse. (See Appellee's Brief, p. 13). Suto, in her deposition, merely states she put this document in a mail-out bin and in turn someone else would pick it up and someone in the mailroom would mail it out. There is no specific testimony that Ann Suto in fact mailed a Copy 25 to Rust (Depo. of Suto, pp. 12-13). Mr. Rice in his deposition merely said in response to a question asking him if he knew what happened to Copy 25: "Well, personally I can't say I know, except the fact that they sent them out to the customer. I mean, that is the standard way of what we did with them." (Depo. of Rice, pp. 18-19).

Westinghouse, on page 15 of its Brief, incorrectly quotes the stamp placed on the Southwest purchase order by Mr. Rice. The correct quotation should be as follows: "* * * Order accepted subject to conditions outlined in attached W. E. Corp. form of acknowledgement." (Ex. 2-A, App. p. 26).

Westinghouse provides no citation to the record for the following sentence contained on p. 15 of its Brief:

> The word 'attached' was crossed out by Mr. Rice because the Westinghouse acknowledgement form (Copy 25) had already been sent to Rust on June 13, 1960, when the order had been written up following receipt by Westinghouse of the letter of intent.

In this regard, the Court should see the testimony of Westinghouse employees Suto and Rice in their Depositions at pp. 12-13 and pp. 18-19, respectively.

Westinghouse, on p. 17 of its Brief, provides no citation as to the location in the record of the following reported fact: "On no occasion did Rust or Southwest make any inquiry of Westinghouse or express any questions relative to the Westinghouse terms and conditions in this case."

Westinghouse, on pp. 17-18 of its Brief, states:

> By this point, it was obvious that two documents assumed considerable importance. The first was 'Copy 25,' the order acknowledgement form, prepared by Westinghouse following receipt of the Rust letter of intent. *This was important because it showed Westinghouse considered the letter of intent as an order and because its return to Rust restated the Westinghouse warranty in the same terms as the Westinghouse proposal of May 18, 1960, to which the Rust letter of intent had responded.* The Westinghouse testimony was that Copy 25 had been sent to Rust on June 13, 1960. Rust said its file was lost and it did not know if it had received Copy 25 (Id., p. 17, 24). (Emphasis added)

As previously shown by Southwest, there is no testimony in the record to show that the Copy 25 was actually sent to Rust and, as Westinghouse states, there is no testimony to show posi-

tively that Rust received the Copy 25. Additionally, the testimony of John J. Sherman, Sales Engineer for Westinghouse and the sales representative who dealt with Rust in the sale of the turbine generator in question (TR* 371), admitted that even Westinghouse did not consider that it had an order for the steam turbine generator until it received the Southwest purchase order dated July 6, 1960 (Ex. 2-A, App. p. 26). Mr. Sherman testified:

> Q. Did you know that sometime after your form of general order was prepared, that Westinghouse Electric Corporation received a formal purchase order from Southwest Forest Industries for the turbine generator?
>
> A. I would know that that happened.
>
> Q. Do you have a recollection that in fact it did happen?
>
> A. Yes, because this is the way the salesman gets his credit, *when the treasury and order departments say we really have an order from the customer at this stage of the game.*
>
> (Depo. of Sherman, 8/4/67, p. 11) (Emphasis added)

Also, Mr. John J. Rice, a Westinghouse order correspondent, testified that he understood that Southwest would send a formal purchase order following the letter of intent of June 6, 1960. Mr. Rice testified as follows:

> Q. I will show you a document which I will mark as Rice 5 and ask you if this is a copy of that letter of intent?
>
> (Thereupon, Rice Exhibit No. 5 was marked for identification).
>
> A. Yes, yes.
>
> Q. *Did you understand, when you read this, sir, that there would be coming from the customer a formal order to cover the purchase?*
>
> A. *Yes.*
>
> Q. And did the formal order eventually come?
>
> A. Yes, it did.
>
> (Depo. of Rice, pp. 11-12, dated 8/5/67) (Emphasis added)

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*Transcript of Record.

Westinghouse, on p. 19 of its Brief, incorrectly states that Mr. Baker testified that the purchasing files maintained by Mr. McBride (*sic*) had been destroyed. In fact, Mr. Baker's testimony concerning the purchasing files was as follows: "A. *That has been destroyed, apparently. We have not found it. We don't keep them forever.*" (Depo. of Baker, 8/7/67, pp. 4-5) (Emphasis added)

Westinghouse continues to misquote the testimony of Mr. Baker on p. 19 of its Brief, wherein it states that Mr. Baker denied ever seeing a copy of the Southwest purchase order stamped by Westinghouse. The question asked of Mr. Baker by Westinghouse's counsel was whether Pl. Ex. 2-A was received by Mr. Baker, *personally*. In response thereto, Mr. Baker testified that as far as he could recall it was not. He also testified that Revisions Nos. 2, 3 and 4 were not received by him, *personally,* in direct response to Westinghouse counsel's question on this point. (See Depo. of Baker, 8/7/67, pp. 7-8).

Westinghouse, on pp. 23, 26 of its Brief, would improperly lead the Court to believe that Southwest is merely seizing upon the expression "renewed motion for summary judgment" and that a motion for summary judgment was never made by counsel for Westinghouse. This is not the fact. Mr. Flynn (lead counsel for Westinghouse) specifically and clearly informed the Lower Court on August 10, 1967, that:

> *I would like to supplement and make clear, we do at this time formally renew our motion for summary judgment,* or both motions for summary judgment heretofore made and I believe argued on Monday afternoon, and would request the court to reconsider the memorandums that were supplied at that time as being the memorandums in support of the motions which are on file. (TP* 224) (Emphasis added)

The Court was under no impression other than that Westinghouse was renewing its motion for summary judgment, for on the proceedings held August 11, 1967, the Court made the record perfectly clear and stated outside the hearing of the jury:

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*Transcript of Proceedings.

> *Before we start, just to make sure that on any review the record is perfectly clear,* following the request and discussion with counsel, that's on the record for yesterday afternoon, *the defendant has renewed its motion for summary judgment on all portions of the complaint as presently amended and before the court other than the anti-trust count and the plaintiff concurs in this procedure;* is that correct? (TP 229) (Emphasis added)

Westinghouse, on p. 24 of its Brief, makes the broad statement, without the support of citation to the record, that: "It was understood by all involved that if the court ruled in favor of Westinghouse on both questions being submitted, the case was over."

ARGUMENT

INTRODUCTION:

SOUTHWEST WILL REPLY TO THE ARGUMENTS OF WESTINGHOUSE GENERALLY IN SEQUENCE, EXCEPT SECTIONS III AND V WILL BE DEALT WITH TOGETHER SINCE THEY ARE INTERRELATED.

I. (A) The Court Cannot Grant a Motion for Summary Judgment When the Moving Party Failed to Establish That There Were No Genuine Issues as to Material Facts, Even Though Counsel May Agree as to the Historic Facts.

Westinghouse has very cleverly and skillfully attempted to ". . . set forth at some length the procedural history of this case because, we submit, it demolishes Southwest's argument that this is a summary judgment case." (Appellee's Brief, p. 28), even in light of the fact that none of the parties, including the Lower Court considered Westinghouse's motion other than as a renewed motion for summary judgment. (See TP 224, 229)

Consequently, it is submitted that under no circumstances does the lengthy procedural history set forth by Westinghouse demolish Southwest's argument that this was a summary judgment case as the record appropriately reflects. (See also TR 979, 1010-11)

Even at this date, Westinghouse does not contend that it established on its motion for summary judgment that there were no genuine issues as to material facts. Westinghouse merely relies on

the agreement by counsel and upon the Court's Opinion in granting Westinghouse's motion for partial summary judgment.

Westinghouse purports to be surprised that Southwest could now dispute the plain fact that both parties put in all the evidence they had on the critical issue and specifically requested the Court to decide the issue one way or the other; however, Westinghouse is attempting to assert this statement as a matter of fact when the record is void of any such request made by counsel for either party. (See Appellee's Brief, p. 29). In the event the record is not void of such a request, then it became the duty of Westinghouse to specifically point out to the Court where in the record the parties specifically requested the Court to decide the issue one way or the other. Westinghouse has not seen fit to so do.

Westinghouse, in an attempt to bolster its argument that the Court was specifically requested to decide the issue one way or the other, would suggest to this Court that ". . . the parties would hardly take time out in the middle of a trial to excuse the jury, enter into elaborate stipulations, and supplement the record with exhibits and depositions if the only purpose was to re-urge a motion for summary judgment which had once been denied." (Appellee's Brief, p. 29). However, Southwest would submit that if counsel and the Court had in fact agreed to a trial to the Court, as suggested by Westinghouse, then they would have taken the appropriate steps to protect their record as the lower court did when it stated, ". . . just to make sure that on any review the record is perfectly clear . . . the defendant has renewed its motion for summary judgment . . ." (TR 229).

Westinghouse has attempted to distinguish *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, 37 S.Ct. 287, 61 L.Ed. 722 (1917); *Cram v. Sun Ins. Office, Ltd.*, 375 F.2d 670 (4th Cir. 1967); and *Brawner v. Pearl Assurance Co.*, 267 F.2d 45 (9th Cir. 1958) by arguing that the counsel for Westinghouse and Southwest did not purport to bind the Court by agreements on questions of law and that they merely agreed *"on the facts"*. (Appellee's Brief, p. 31) (Emphasis supplied). However, what Westinghouse fails to point out to this Court is that the historic

facts were not free from controversy and that the parties disagreed as to the inferences which were to be drawn therefrom. (See Argument of Counsel, App. pp. 78-86).

Westinghouse would now like to come within the ambit of *Gillespie v. Norris,* 231 F.2d 881 (9th Cir. 1956) and bases its present contention on the theory that the parties actually tried this matter to the Lower Court, even in light of the record which is contrary. (See TP, pp. 222-24, 229). At the outset, it should be noted that in *Gillespie* the appeal was dismissed as being premature, but with some hesitancy by the Court. The Court stated:

> It is with some hesitation that we have decided to dismiss the appeal. The points upon which this action is taken were not raised by the parties, and no argument has been heard upon these. *The form of the judgment gives us great trouble. There is doubt as to whether the intention was to enter a summary judgment, a partial summary judgment or a judgment on the merits. As a result, there is some confusion as to whether Rule 54(b) or 56(d), Federal Rules of Civil Procedure, 28 U.S.C.A., applies.* (231 F.2d 882-83) (Emphasis added)

Also, the Court noted in its Opinion that summary judgment cannot be granted where there are questions of fact to be disposed of, even by consent of all concerned.

Additionally, the *Gillespie* case is entirely distinguishable from the case at bar because: (1) the trial judge specifically found as a matter of law that there was no genuine issue of fact; (2) a jury was not presently empaneled and hearing the case; (3) the appeal was dismissed as being premature; and (4) the plaintiff had included,

> . . . in his statements of points on appeal a specification that '[T]he evidence is insufficient to support the findings of fact or judgment,' which must be based upon the assumption that the trial court considered the evidence.
> (231 F.2d 884)

Westinghouse also attempts to rely upon the case of *Demelle v. Interstate Commerce Commission,* 219 F.2d 619 (1st Cir. 1955), which involved an action by the Interstate Commerce

Commission to enjoin the defendant from carrying on interstate motor operations between points in Maine not covered by a certificate of public convenience and necessity issued by the Commission. "It was stipulated by the parties that there was no genuine issue as to any material fact and that the sole issue before the court was the interpretation of the defendant's irregular route authority." (219 F.2d 620) The Appellate Court affirmed the decision of the trial court in holding that when the District Court granted summary judgment there were no factual issues to be decided and no indication that any evidence would be offered in an attempt to prove what the intention of the Commission had been when such certificate was granted, and that the only dispute involved was the language of the certificate itself.

A most significant point in the *Demelle* case is the concurring opinion of Woodbury, Circuit Judge, wherein he stated:

> I concur in the result for I believe that it is more probable than not that the certificate means what Judge Clifford and this court think that it means. *However, I do not wish to go on record as subscribing to the proposition that the failure of the parties to raise a question of fact below, or their stipulation that no issue of fact existed, necessarily requires that this case be disposed of on the motion for summary judgment filed by the Commission under Rule 56(c).* (219 F.2d 622) (Emphasis added)

The *Demelle* case is distinguishable in that: (1) the sole issue was the interpretation of the clause in the certificate of convenience and necessity; (2) the parties stipulated that the sole issue was the interpretation of such clause; (3) the defendant based his argument on the theory that the certificate was ambiguous; and (4) of particular importance, a jury was not empaneled and hearing the case when the motion for summary judgment was presented to the Court.

The case of *Tripp v. May,* 189 F.2d 198 (7th Cir. 1951), cited by Westinghouse, involved an action to recover overtime compensation, liquidated damages and attorneys' fees under the Fair Labor Standards Act. The defendant's answer denied liability and

asserted plaintiff's exemption from the provisions of the Act. Defendant thereupon filed a motion for summary judgment based upon the same grounds as set forth in its answer. The trial court denied defendant's motion and rendered findings of fact to the effect that throughout plaintiff's period of employment he was not employed in a bona fide administrative capacity. The Court thereupon, on oral motion of plaintiff, some ten days later rendered judgment for plaintiff.

On appeal, defendant urged a procedural error in that the plaintiff's oral motion for summary judgment was without notice. The Appellate Court held that under the circumstances disclosed by the record there was no procedural defect in such a disposition of the case. Additionally, and as a further reason for approving the entry of a judgment on the record presented to the Appellate Court, it stated:

> And, as suggested in 3 Barron and Holtzoff § 1239: '*In a nonjury case* if both parties move for summary judgment and the court finds that there are issues of fact but that the facts have been fully developed at the hearing on the motions, the court may proceed to decide the factual issues and give judgment on the merits. This of course amounts to a trial of the case and is not technically a disposition by a summary judgment.' (189 F.2d 200) (Emphasis added)

The Appellate Court then went on to determine whether the facts were sufficient as a matter of law to establish that the plaintiff was an exempt employee under the Fair Labor Standards Act provisions, and subsequently affirmed the judgment.

The *Tripp* case is inappropriate to the case at bar and is distinguishable in that a jury was not empaneled and actually hearing the case; and the Court in the *Tripp* case recognized that there remained a question as to whether or not the undisputed facts were sufficient as a matter of law for the granting of a summary judgment in favor of the plaintiff.

Consequently, Southwest would submit that the rationale of *Gillespie, Demelle* and *Tripp, supra,* are inappropriate in the case at bar, and each of them are distinguishable and none on point.

Southwest maintains that the agreement between counsel for Southwest and Westinghouse that there existed no genuine issue as to any material facts, is inoperative on the theory and rationale of *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, 37 S.Ct. 287, 61 L.Ed. 722 (1917); *Cram v. Sun Ins. Office, Ltd.*, 375 F.2d 670 (4th Cir. 1967); and *Brawner v. Pearl Assurance Co.*, 267 F.2d 45 (9th Cir. 1958) heretofore cited by Southwest (See Appellant's Opening Brief, pp. 18-20).

Additionally, Southwest urges the theory adopted by the Court in the case of *Koleinimport "Rotterdam" N.V. v. Foreston Coal Export Corp.*, 283 F.Supp. 184 (S.D.N.Y. 1968) where the Court held that there were issues of fact sufficient to preclude summary judgment where the parties disagreed as to whether contracts existed, and where the transactions were fragmented into numerous cables, letters and conversations, the cables containing vernacular of the trade and abbreviated phraseology. The Court stated the following with regard to the appropriateness of granting a summary judgment in such a case:

> *Although a substantial part of the evidence is documentary, the parties dispute the inferences to be drawn therefrom.* The inferences to be drawn from such evidence 'must be viewed in the light most favorable to the party opposing the motion.' * * *
>
> *This is not a case involving the construction or interpretation of 'clear and unambiguous' language of documentary exhibits.* * * * In fact, the exact opposite is exemplified by this particular case: the transactions are fragmented into numerous cables, letters and conversations; the cables themselves are couched in the vernacular of the trade and are worded in abbreviated phraseology; the parties disagree about the relevancy of some of the documents; and there is a genuine issue as to the meaning and significance of almost all of them. * * * (283 F.Supp. 187-88) (Citations omitted) (Emphasis added)

Consequently, it is respectfully submitted that the agreement of counsel is a nullity and inoperative, and since Westinghouse renewed its motion for summary judgment and, as the moving

party, has totally failed in its heavy burden to establish that there were no genuine issues as to any material facts, the Lower Court erred in granting a partial summary judgment to Westinghouse when the Lower Court did not find that there were no genuine issues as to any material facts.

I. (B) When There Is a Controversy as to the Inferences Which Are Drawn from the Historic Facts, the Lower Court Cannot Grant a Summary Judgment.

At this point Southwest feels it is imperative to inform the Court that Westinghouse has wholly failed to respond to or contradict Southwest's arguments and authorities set forth at pp. 21-26 of Southwest's Opening Brief.[1] Since Westinghouse failed to respond to Southwest's argument as set forth in Question No. I B, the only conclusion that can be reached is that Southwest's theory and authorities are correct and that Westinghouse has admitted that the entry of partial summary judgment by the lower court was in error.

The rationale of Southwest's argument as presented in Question I B is that in determining whether or not there are genuine issues as to material facts, not only must the historic facts be free from controversy, but there must also be no controversy as to the inferences which may be drawn from the historic facts. Additionally, the non-moving party is entitled to all favorable inferences which can be drawn from the historic facts, and all doubts as to the existence of a genuine issue as to a material fact must be resolved against the moving party prior to the granting of a

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1. The only statement which Southwest can find with regard to this portion of Appellee's Brief is on p. 31 thereof wherein it states: "Much of Southwest's argument is based on the proposition that agreements of counsel on questions of *law* are not necessarily binding on the court (see, *e.g.*, Appellant's Brief, pp. 17, 25)." (Emphasis supplied)

summary judgment. The rationale of this theory is set forth in a multitude of cases, among which are: *American Fidelity & Cas. Co. v. London & Edinburgh Ins. Co.,* 354 F.2d 214 (4th Cir. 1965); *Cram v. Sun Insurance Office, Ltd.,* 375 F.2d 670 (4th Cir. 1967); *Consolidated Electric Co. v. United States,* 355 F.2d 437 (9th Cir. 1966); and *Koleinimport "Rotterdam" N.V. v. Foreston Coal Export Corp.,* 283 F.Supp. 184 (S.D.N.Y. 1968).

In the case of *American Fidelity & Cas. Co. v. London & Edinburgh Ins. Co.,* 354 F.2d 214 (4th Cir. 1965), the Court stated this theory as follows:

> *. . . Not merely must the historic facts be free of controversy, but also there must be no controversy as to the inferences which may be drawn from them. It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may properly be drawn. Under such circumstances the case is not one to be decided on a motion for summary judgment.* (Emphasis added) (354 F.2d at 216)

In the case at bar there may be no dispute as to the historic documents which comprise the contract documents between Southwest and Westinghouse, but there is a definite and genuine dispute as to the inferences which may be drawn from them. The Court will note, counsel for Southwest and Westinghouse, after agreeing upon the historic documents, then proceeded to argue to the lower court the various inferences which were drawn from the historic facts and documents. The inferences which were drawn from the historic documents by respective counsel were in direct controversy and conflict. (See Argument of Counsel, App. pp. 77-86).

Therefore, it is respectfully submitted that Westinghouse has admitted that the Lower Court was in error in granting its partial summary judgment when Westinghouse totally failed to respond to or contradict the theory and authorities cited by Southwest in its argument.

I. (C) Where the Conduct of the Parties Recognizes the Existence of a Contract but the Documents of the Parties Do Not Establish a Contract, Then There Is a Contract Between the Parties Which Consists of Those Terms on Which the Documents of the Parties Agree Together with Any Supplemental Provisions Supplied by the UCC.

Westinghouse has virtually ignored Question No. II A presented by Southwest, and merely relied upon the following statement: "Southwest's argument on the 'meeting of the minds' issue as it appears in Appellant's Brief, pp. 26-35 is not too clear to Westinghouse." (Appellee's Brief, p. 32). Additionally, Westinghouse states that Southwest has not shown that the Lower Court's Opinion was clearly erroneous and then attempts to rely upon the Lower Court's Opinion.

The reliance by Westinghouse on the Lower Court's Opinion is not well founded. The case of *Castner v. First National Bank of Anchorage,* 278 F.2d 376 (9th Cir. 1960) involved an appeal from the granting of a summary judgment, and the Court of Appeals stated:

> However, we are not concerned with the reasons given by the district judge for his action but rather center our inquiry upon a determination of whether the judgment he entered was right. * * * To do this, we must now proceed to examine the record as it was presented. (278 F.2d 381) (Citations omitted)

Consequently, Southwest has no obligation at this time to review the reasoning of the Lower Court, nor show that the Lower Court's ruling was clearly erroneous as Rule 52(a) of the Federal Rules of Civil Procedure is not appropriate.

Southwest submits that one of the reasons why Westinghouse did not come to grips with Southwest's argument as set forth in Question No. II A was because it did not want to understand this argument as it is one of the major arguments proposed by Southwest and presents the applicable ruling which should result if § 2-207 of the *Uniform Commercial Code* had been properly applied by the Lower Court.

On the back page of Ex. Y-2 (App. pp. 12-13), the letter sent by Westinghouse to Rust Engineering on May 18, 1960, offering to sell to Southwest a 25,000 kw. turbine generator unit, it is stated in inconspicuously small type:

> ORDERS—On orders placed with Westinghouse in accordance with this quotation the above conditions shall take precedence over any printed conditions that may appear on your standard order form.

On July 6, 1960, Southwest by its purchase order signed by James A. Staley (Ex. 2-A, App. p. 26) responded to Westinghouse's offer to sell a 25,000 kw. turbine generator unit; however, on the face of Southwest's purchase order, it is stated in bold type:

> IMPORTANT INSTRUCTIONS
> * * *
> Shipment and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases constitute an unqualified acceptance of all the terms and conditions of this order by the vendor.

Southwest respectfully submits that these provisions are in irreconcilable conflict and that as a result thereof there could never be a meeting of the minds of the contracting parties, Southwest and Westinghouse.

The case of *Euclid Engineering Corporation v. Illinois Power Company*, 78 Ill.App.2d 235, 223 N.E.2d 409 (1967), held that the Uniform Commercial Code still required an agreement or meeting of minds between the negotiating parties before there could be a contract. Since the contracting documents between Southwest and Westinghouse are in irreconcilable conflict, how could there be a meeting of the minds?

§ 2-207(3) of the *Uniform Commercial Code* provides that where the minds of the contracting parties did not meet on all the essential terms and conditions, as set forth in their respective documents, then in such a case there is still a contract between

the contracting parties if conduct by both parties recognizes the existence of a contract. § 2-207(3) provides: The contract consists of those terms on which the documents of the parties agree and any other terms supplemented by the *UCC*.

Additionally, Comment 7 of the official Comments guides the Court as to how Sub-§ (3) of § 2-207 is to operate. It states:

> In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See Section 2-204. The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule.

Therefore, it is submitted that the contracting documents between the parties did not constitute a contract due to the irreconcilable conflict in the documents themselves. However, neither party can deny that a contract did not exist between them because the turbine generator unit was shipped by Westinghouse and substantially paid for by Southwest prior to the arising of any dispute. Consequently, § 2-207(3) of the *UCC* should apply and the contract between the parties consists of only those terms upon which the writings of the parties agree and any missing terms or provisions would be supplemented by the other provisions of the *UCC*.

I. (D) The Lower Court Erred in Determining That Paragraphs (2) and (12) of Southwest's Purchase Order Dated July 6, 1960, Were "Additional" Terms.

In connection with Question No. II C, it is again apparent that Westinghouse is relying entirely upon their statement that the argument of Southwest "is not too clear to Westinghouse" and their misplaced reliance on the Court's Opinion. Westinghouse has made no attempt whatsoever to rebut the authority cited by Southwest.

Southwest submits that the Lower Court incorrectly determined (assuming arguendo that there was a meeting of the minds between Southwest and Westinghouse) that ¶'s (2) and (12) of

Southwest's purchase order (Ex. 2-A, App. p. 26) contained *additional* terms as opposed to *different* terms under § 2-207 of the *UCC*.

Since the authors of the *UCC* made a deliberate distinction between the terms "terms additional to" and "different from" in § 2-207(1), they must have had a specific reason for so doing. § 2-207(1), when read in conjunction with § 2-207(2), further accentuates this distinction in terms as § 2-207(2) contains only the words "additional terms" and does not contain the words "different from".

This distinction was appropriately noted by Mr. Duesenberg and Prof. King in 3 Bender's *Uniform Commercial Code Service*, § 3-301(1), p. 3-28, wherein they discus and define "different" and "additional" terms and how this distinction must operate. (See Appellant's Opening Brief, p. 34).

Consequently, it is respectfully submitted that the Lower Court erred in its determination that ¶'s (2) and (12) of Southwest's purchase order were "additional" terms and not "different" terms.

I. (E) Genuine Issues as to Material Facts Were Presented as to Which Contract Existed and What Terms Were Contained in the Contract Between Southwest and Westinghouse.

Westinghouse, on p. 36 of its Brief, states that under Pennsylvania law the question of what the contract is, is one of law for the Court to determine when the facts are undisputed, and claims that Southwest does not challenge this proposition of law. Westinghouse is severely mistaken in its contention that Southwest does not contend that this proposition of law is incorrect or that the cases cited by Westinghouse are applicable to this case. Southwest has consistently contended that where each of the parties have claimed that a different document was the contract, then a question of fact arose as to which document or documents comprise the contract between the parties.

Westinghouse has cited the cases of *Reitmyer v. Coxe Bros. & Co.*, 107 A.739 (Pa. 1919); *In re Home Protection Building & Loan Ass'n*, 17 A.2d 755 (Sup. Ct. Pa. 1941), and *Buff v. Fetterolf*, 215 A.2d 327 (Sup. Ct. Pa. 1965) for the proposition

that what the contract was is one of law for the Court to determine when the facts are undisputed. *The cases cited by Westinghouse are inappropriate to the question at issue as they deal with implied-in-fact contracts and not with express contracts.*

It is readily apparent that, and we are sure Westinghouse must admit that, a contract was in existence between the parties. However, Southwest is contending that the terms of the contract are derived from the terms of its purchase order (Ex. 2-A, App. p. 26), and Westinghouse is contending that the terms of the contract are derived from its letter to Rust of May 18, 1960 (Ex. Y-2, App. p. 12). Therefore, it is readily apparent that the question is upon which claimed contract did the minds of the parties meet? Did they meet on the claimed contract of Westinghouse? What is the fact? Was it the contract that Southwest claims was entered into, or was it the contract Westinghouse claims the parties entered into?

The Supreme Court of Delaware, applying Pennsylvania law, held in *Pennsylvania Company v. Wilmington Trust Company,* 166 A.2d 726 (Del. 1960) that the intention of the parties in the formation of a contract is a matter to be decided by the trier of fact.

The Court of Appeals for the Third Circuit, in the case of *Melo-Sonics Corporation v. Cropp,* 342 F.2d 856 (3rd Cir. 1965) held that: "Whether this exchange of telegrams and the correspondence previously agreed upon created a contract is a question of intention of the parties and this question of intention is to be a matter for the trier of fact." (342 F.2d 859)

In the case of *O'Neill v. Atlas Automobile Finance Corporation,* 11 A.2d 782 (Sup. Ct. Pa. 1940) the plaintiff brought an action in assumpsit to recover a sum allegedly due for professional services against the defendant, and the defendant counterclaimed. The Court stated that the following items of fact arose: "(a) Did defendant make these contracts, and if so what were their terms? (b) Did plaintiff perform the work called for by them? . . . Each issue was necessarily one of fact to be determined by the jury." (11 A.2d 783). The Court in its holding stated:

> It is well settled that the terms and construction of such a contract are for the jury where, as here, its terms are disputed . . . The jury evidently accepted plaintiffs' version of the terms of their contract and the nature of their duties under it. (11 A.2d 785) (Citations omitted)

Other Pennsylvania cases holding that where the terms of a contract are disputed a jury question is presented are *City of Philadelphia v. Stewart,* 51 A. 348 (Pa. 1902); *Bastian v. Marienville Glass Co.,* 126 A. 798 (Pa. 1924); and *Dougherty v. Proctor & Schwartz,* 176 A. 439 (Pa. 1935).

In the case of *Geistert v. Scheffler,* 25 N.W.2d 241 (Mich. 1946), the Court stated that where each of the parties claimed an express contract, the sole question of fact was which was the correct contract.

In the case of *Clifton v. Village of Constantine,* 293 N.W. 658 (Mich. 1940), the Court stated:

> 'Where an express contract is entered into between parties but they differ as to the terms thereof, and there is evidence tending to support the claim of each of them, it is for the jury to determine what the terms of the contract were, . . .'
> (Citation omitted)

Westinghouse, on p. 36 of its Brief, contends that Southwest:

> . . . makes no suggestion that what it now contends to be a factual finding by the Court is unsupported by the stipulated evidence nor does it contend that it is 'clearly erroneous' within the meaning of Rule 52(a), Federal Rules of Civil Procedure.

This is an incorrect statement of Southwest's position, as Southwest has continually contended that not only is there a question of fact as to which, if any, of the historic documents the parties agreed upon, but there are also questions of fact as to the inferences which were drawn from the historic documents. In addition, Rule 52(a), Federal Rules of Civil Procedure is inappropriate because, here we are dealing with a motion for

summary judgment and not an action tried to the Court without a jury. The judgment entered by the Lower Court was a judgment entered pursuant to Rule 56, and not pursuant to Rule 52(a) and as such the "clearly erroneous" rule would have no applicability. Additionally the testimony derived from the depositions of John Sherman and John J. Rice establish that even Westinghouse did not consider that they had a contract with Southwest until Southwest tendered to Westinghouse its formal purchase order. (See Depo. of Sherman, p. 11; Depo. of Rice, pp. 11-12).

John W. Ruyak, a buyer for Rust, testified at his deposition that the letter of intent was not an acceptance of the vendor's proposal, as it is preliminary to actually getting down into the finer language of the contract. (See Depo. of Ruyak, 8/4/67, p. 16).

Consequently, the various representatives of Westinghouse and Rust agreed the letter of intent was not an acceptance of the contract.

Additionally, Westinghouse consistently alleged that Southwest purchased and Westinghouse sold the turbine generator to Southwest on July 6, 1960 in its various answer and counterclaim (See TR pp. 14, 17, 671, 675, 746 and 750). Westinghouse, itself, under oath stated that the sales documents between Westinghouse and Southwest consisted of the bid invitation issued by Rust on May 3, 1960; the proposal dated May 12, 1960, which was transmitted by letter dated May 18, 1960, to Rust; the letter of intent which was issued by Rust on June 6, 1960; *and a final purchase order which was issued on July 6, 1960.* (See answers to Interrogatory No. 1 submitted by Westinghouse, TR 367-68). At no time prior to August 7, 1967, did Westinghouse consider the Copy 25 acknowledgment, dated June 13, 1960, to be of any consequence between the parties in the purchase and sale of the steam turbine generator unit, for it was not even mentioned in answer to Interrogatory No. 1 (TR 367-68).

Therefore, although Southwest is not required to do so, it is respectfully submitted that the Trial Court was clearly errone-

ous in its findings that a contract came into being on June 6, 1960.

Consequently, it is respectfully submitted that there existed genuine issues as to material facts which prevented the granting by the Lower Court of a summary judgment because the finder of fact must determine which contract existed between Southwest and Westinghouse and what terms were contained therein.

II. (A) The Issue of Unconscionability of the Exculpatory Westinghouse Warranty Was Timely Raised and Is Properly Presented for Review.

Westinghouse, in its second question presented, contends that Southwest's argument that the exculpatory warranty of Westinghouse is unconscionable is untimely. Westinghouse attempts to mislead the Court into believing that counsel for Southwest is for the first time inserting facts in its Brief which are not supported by the record. (See Appellant's Brief, p. 39). Southwest has reviewed the Transcript of Record and indeed finds that the document to which Southwest referred is not included therein. However, counsel for Westinghouse did in fact receive the memorandum to which Southwest has referred in its Opening Brief on p. 36. This document is an 11-page memorandum entitled "Supplemental Memorandum in Opposition to Motion for Summary Judgment", and the portion which Southwest has heretofore included in its Brief is found on p. 9 thereof. In addition, the certificate of delivery on p. 11 thereof states:

> Copy of the foregoing delivered this 11th day of August, at 8:15 O'Clock A.M. to:
>
> John J. Flynn
> LEWIS ROCA BEAUCHAMP & LINTON
> 114 West Adams Street
> Phoenix, Arizona 85003
> Attorneys for Defendant
>
> /s/ R W Perry
> Roger W. Perry

Also, counsel for Westinghouse was fully aware that the issue of unconscionability of the exculpatory warranty of Westinghouse was in issue, for on the same date when counsel for Westinghouse received the Memorandum above mentioned, they argued at considerable length to the Court that the exculpatory warranty of Westinghouse was not unconscionable. (Appellant's Opening Brief, pp. 36-37).

Westinghouse, on p. 40 of its Brief, goes to some length in an attempt to argue the theory that a party may not raise on appeal issues and theories which he did not present or litigate in a trial on the merits below. The cases cited by Westinghouse are inappropriate and not on point in the situation at bar, as all the cited cases involved actual trials on the merits, which had been commenced and terminated by judgment, with the exception of one which was dismissed as being premature.

The *Eason v. Dickson,* 390 F.2d 585 (9th Cir. 1968) case involved an action under the Civil Rights Act by a state prisoner against the chairman of State Adult Authority Board and the administrator of Youth and Correction Agency of the State for damages and injunctive relief. The petitioner requested that a 3-judge district court be convened to hear the matter, in view of the prayer for injunctive relief. The lower court refused to convene the 3-judge district court and granted summary judgment in favor of the defendants. The Appellate Court held that where the state prisoner's contention, that the State Statutes governing parole revocation were unconstitutional as they did not provide for a court hearing, had been overruled on several occasions, the prisoner did not present a substantial constitutional question. Additionally, the Court held that the Lower Court's order denying convention of a 3-judge court was not a final decision from which an appeal would lie, as it did not terminate the litigation on the merits. Consequently, the prisoner's notice of appeal was premature.

The other cases cited by Westinghouse: *Roberson v. United States,* 382 F.2d 714 (9th Cir. 1967); *Pacific Queen Fisheries v. Symes,* 307 F.2d 700 (9th Cir. 1962); *Inman-Poulson Lumber*

Co. v. Commissioner of Int. Revenue, 219 F.2d 159 (9th Cir. 1955); *United States v. Waechter,* 195 F.2d 963 (9th Cir. 1952); and *Wilson v. Byron Jackson Co.*, 93 F.2d 572 (9th Cir. 1937), are wholly inapplicable to the situation at bar, as all of these cases involved an appeal following a full trial on the merits and not the granting of a motion for summary judgment.

Westinghouse also cites the cases of *Cleary v. Indiana Beach, Inc.,* 275 F.2d 543 (7th Cir. 1960); *Royal Indem. Co. v. Olmstead,* 193 F.2d 451 (9th Cir. 1951); and the authorities of 3 Barron & Holtzoff/Wright, *Federal Practice and Procedure,* § 1304 (1958); and 6A Moore, *Federal Practice,* ¶ 59.07 Rev. ed. 1966) for the proposition that a party may not raise on appeal issues and theories which he did not present or litigate below after judgment in the court below.

In the *Cleary v. Indiana Beach, Inc.* case, there was an actual trial to a jury on the merits, and subsequently, the plaintiff was denied the right to amend his complaint to allege that defendant had been guilty of wilfull and wanton conduct. In *Royal Indem. Co. v. Olmstead,* the Court merely held that it was within the discretion of the Court to refuse the appellant permission to amend its answer after summary judgment had been entered. The cited authorities of 3 Barron & Holtzoff/Wright, *Federal Practice and Procedure,* § 1304 (1958) and 6A Moore, *Federal Practice,* ¶ 59.07 (Rev. ed. 1966) are wholly inapplicable to the case at bar as the sections cited involve grounds for granting a new trial. In the case at bar, Southwest is not seeking a new trial, but the reversal of a motion for summary judgment.

Westinghouse cites the case of *Albrecht v. Herald Co.,* 367 F.2d 517 (8th Cir. 1966) for the proposition that when the shift of theories comes before judgment, but after the case has been presented on another theory, it comes too late. In the *Albrecht* case, a jury verdict was involved and the Court held it was too late after conclusion of the evidence for plaintiff to change its theories, and as such, this case is wholly inapplicable.

Consequently, the cases and authorities cited by Westinghouse are wholly inapplicable and distinguishable as they do not deal

with situations similar to the situation at bar. It is respectfully submitted that the issue of unconscionability of the exculpatory warranty clause of Westinghouse was timely raised by the parties and is properly here for review.

II. (B) When the Exclusive Remedy of Repair or Replacement Fails, All the Ordinary Remedies Provided by the UCC Become Available to the Aggrieved Party.

Westinghouse, on p. 41 of its Brief, has stated that the question presented by Southwest contains factual assumptions which contradict the record. However, Southwest has specifically shown that the unconscionable exculpatory warranty of Westinghouse was not brought to the attention of Southwest. (See Appellant's Opening Brief, pp. 30-32).

Westinghouse cannot now merely rely upon the Lower Court's Opinion for its position in opposition to Southwest's argument. See *Castner v. First National Bank of Anchorage,* 278 F.2d 376 (9th Cir. 1960).

Westinghouse goes on to state, at p. 42 of its Brief, that Southwest has no cases supporting its proposition and obviously could not have such authorities since § 2-719(3) of the *UCC* expressly authorizes the exclusion of consequential damages. However, what Westinghouse has failed to point out is that § 2-719(2) specifically provides that where the exclusive or limited remedy fails in its essential purpose then remedy may be had by the injured party as provided in the *UCC*. § 2-719(2) specifically qualifies § 2-719(3), which Westinghouse relies upon entirely, by stating: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act." Westinghouse does not seriously resist this argument of Southwest, because it has cited no cases which are contrary to the Court.

The cases cited by Southwest and re-cited by Westinghouse in its Brief at p. 43 all stand for the proposition that if the exclusive remedy of repair fails, all of the *UCC* remedies become available. Westinghouse has not effectively distinguished

any of the cases cited by Southwest, other than to state that none of these cases involved a claim of unconscionability. However, the basis for each of the Court's holdings in all of the cases cited by Southwest were grounded upon an unconscionable theory.

The question squarely presented to the Court is this: Where Westinghouse seeks to avoid liability for damages under a contractual provision limiting and excluding such liability, but also requiring Westinghouse to repair or replace equipment which is defective, will the failure of Westinghouse to accomplish the repair, or negligence or undue delay in making such repairs, render it liable for damages, notwithstanding the express limitation of liability?

There are a number of cases involving express warranties by which the seller of a particular item had included a provision for repair or replacement of defective parts disclosed within a certain period of time in order to make the item in question apply with the warranted performance. The cases have consistently held that where the seller has attempted to correct the defect but has been unable to do so, or where the seller has taken an unreasonable time to repair or replace such defective item, recovery for damages will be allowed.

In *Westinghouse Electric & Mfg. Co. v. Glencoe Cotton Mills,* 106 S.C. 133, 90 S.E. 526 (1916), Westinghouse sought to recover the purchase price of six electric motors sold to the defendant for use in its cotton gin. The contract contained the following warranty:

> 'The company guarantees that the apparatus herein specified will generate or utilize electrical energy to their rated capacities without undue heating and will do their work in a successful manner, provided they are kept in proper condition and operated under normal conditions, and the purchaser supplies competent supervision for their operation. *The company agrees to correct, at its own expense, any defects of labor or material in said apparatus which may develop under normal and proper use within thirty days after the starting thereof,* provided the purchaser gives the

> company immediate written notice of such defects, *and the correction of such defects by the company shall constitute a fulfillment of its obligation to the purchaser hereunder.'*
> (90 S.E. 526)

One of the motors was found to be defective shortly after installation and Westinghouse was promptly notified. Westinghouse made repeated efforts to correct the defect; but the cause of the trouble was not discovered until more than 2 years later. Pending the discovery and correction of the cause of the trouble, defendant's operations were subjected to frequent interruptions, and defendant incurred expense in getting another motor to run the spinning frames, and in attempting to ascertain the cause of the trouble. The Court, acknowledging the principle that Westinghouse had a right to limit its warranty and that the rights of the parties are to be determined under the express warranty contained in the contract, concluded that Westinghouse would be liable for its failure to correct any defects appearing within the thirty day period after the lapse of a reasonable time in which to do so.

> It follows that plaintiff is not liable for damages resulting from any defects that did not develop within 30 days after starting to run the motors; but that it is liable for all damages that *naturally and proximately resulted from its failure to correct such defects after the lapse of a reaosnable time within which to do so,* after notice thereof given as required by the contract.
> (90 S.E. 527)

The holding in the *Glencoe* case is clear that where a seller fails to comply with the obligations contained in the warranty concerning repair and replacement, he will be held liable for damages which accrue to the purchaser as a direct and proximate consequence of his breach.

In the case of *Dieter v. Frick Co.,* 169 S.C. 480, 169 S.E. 297 (1933), the plaintiff purchased from the defendant refrigerating plant under a contract containing an express warranty and limitation of liability to the replacement of defective parts. The

warranty provided that "Frick Company is not to be liable for any losses, damages or delays caused by defects, except to furnish duplicate parts as provided herein; *its liability being expressly limited to furnishing duplicate parts.*" (169 S.E. 298) (Emphasis added). After installation of the equipment and during the specified time limit, certain parts proved defective and broke and the whole plant was stopped, and plaintiff's business, dependent on it, was at a stand-still. The defendant was notified of the defects but failed to furnish new parts until plaintiff paid an installment due on the note given for the purchase price, even though defective parts under the warranty were to be replaced free of charge. This refusal resulted in plaintiff's plant being shut down for a period of forty-six (46) days, which the Court determined to be an unreasonable length of time. Plaintiff instituted the action to recover damages based upon a breach of the express warranty contained in the contract. The defendant contended that, under the terms of the warranty, if it should fail or refuse to furnish duplicate parts, plaintiff's only remedy would be to sue for the value of the parts, and if it did furnish the duplicate parts, then under the contract it would not be liable for any damages, delays or losses. The court noted that the defendant denied liability on the contract, but was attempting to hold plaintiff to its strictest terms. The Court held that in the circumstances, the plaintiff was entitled to recover all of the damages which it suffered by reason of the refrigeration plant being shut down pending the receipt of duplicate parts.

More recent is the case of *Steele v. J. I. Case Company,* 197 Kan. 554, 419 P.2d 902 (1966), wherein the plaintiff-purchaser sought to recover in an action for breach of an express warranty relating to three combines purchased from the defendant-manufacturer ("Case") for the harvest of Kansas crops. From the outset, the machinery failed to operate properly, causing many delays and consequent loss of grain. Attempts by representatives of Case to repair the machinery were unsuccessful. The action was instituted to recover damages resulting from delays due to the alleged breach of the warranty. Generally, the warranty

provided defendant with the opportunity to remedy defects, or to furnish a new machine or refund the purchase price in the event the machine cannot be made to fulfill the warranty. Paragraph 5 of the contract specifically provided:

> 'The Company's liability for any breach of this warranty is limited to the return of cash and/or notes actually received by it on account of the purchase price of said product or part.' (419 P.2d 905).

The Court first treated the issue of whether Case complied with its warranty by supplying new combines for a subsequent harvest season:

> The seller of a piece of machinery would be wrong to suppose that he could fully fulfill a warranty, containing provisions similar to Paragraph 2(b) [repair, replacement], by first taking an inordinately long time in an effort to remedy the defect and then, failing in his attempt, by furnishing a substitute machine a year after special damages had accrued. We believe such is not the law.
> (419 P.2d 907)

With respect to the clause limiting liability of Case, the Court stated:

> . . . However, the question presented in *this* action is whether the limitation contained in Paragraph 5 precludes recovery of consequential damages of the character shown here, damages which, we hasten to add, we think must be within the contemplation of every person dealing in harvesting equipment who is familiar with the exacting demands of a Kansas harvest.
> (419 P.2d 908) (Emphasis supplied)

The Court concluded in its holding that, "under the conditions outlined, . . . it would be unfair and inequitable to give effect to the provisions of limitation encompassed in the warranty." (419 P.2d 910). The holding, therefore, is one of "unconscionability."

For other cases allowing recovery when the exclusive remedy of repair or replacement failed, see *Edenton-Mackeys Ferry Co.*

v. Fairbanks-Morse & Co., 201 N.C. 485, 160 S.E. 572 (1931); *Fairbanks, Morse & Co. v. Twin City Supply Co.,* 170 N.C. 315, 86 S.E. 1051 (1915); *Minneapolis-Moline Power Implement Co. v. Wright,* 233 Mo.App. 409, 122 S.W.2d 397 (Mo.Ct.App. 1938); *Mayfield v. George O. Richardson Machinery Co.,* 208 Mo.App. 206, 231 S.W. 288 (Mo.Ct.App. 1921); *Reitan v. Wilkinson,* 154 Okla. 163, 7 P.2d 486 (1932); *A. Baldwin Sales Co. v. Mitchell,* 174 La. 1098, 142 So. 700 (1932); and cases and authorities cited by Appellant in its Opening Brief, pp. 40-45.

The record is replete with evidence showing that Westinghouse failed to promptly repair the steam turbine generator, and when it did repair the generator it was done in a negligent manner. (See Summary of Depo. App. pp. 87-96; Appellant's Opening Brief, pp. 7-9).

Therefore, it is respectfully submitted that since Westinghouse negligently manufactured the steam turbine generator unit so that it failed to function and perform properly, and when Westinghouse undertook to repair the Unit, the repairs were negligently made and failed to remedy the defects as promised, Southwest is entitled to all the remedies provided by the *UCC* because Southwest has been deprived of a substantial value of its bargain.

II. (C) An Excessively High Price May Constitute an Unconscionable Contractual Provision Under the UCC.

Westinghouse on p. 43 of its Brief would lead the Court to believe that Southwest has cited no cases indicating that an excessively high price may constitute an unconscionable contractual provision. Apparently, Westinghouse has not read the case of *Ceneral Budget Corp. v. Sanchez,* 53 Misc.2d 620, 279 N.Y.Supp.2d 391 (1967) wherein the Court held that excessively high prices may constitute unconscionable contractual provisions. Other cases have also held that where a party was paying an amount in excess of the value of the goods or services they were to receive, the contract would not be enforced because

of its unconscionable features. See *American Home Improvement, Inc. v. MacIver,* 201 A.2d 886 (N.H. 1964); *Frostifresh Corporation v. Reynoso,* 281 N.Y.Supp.2d 964 (1967); *State by Lefkowitz v. ITM, Inc.,* 275 N.Y.Supp.2d 303 (1966).

Therefore, it is respectfully submitted that the contract as contended by Westinghouse may be unconscionable as a result of the alleged violation of § 1 of the Sherman Act, 15 U.S.C. § 1.

III. (A) Southwest Has Pleaded and Suffered Legally Sustainable Claims in Negligence and Strict Liability Allowing Recovery of Its Losses Under the Tort Measure of Damages.

The reply of Southwest to Westinghouse's argument contained in §'s III and V of Appellee's Brief is combined in one, as they are interrelated. This is necessitated because the thrust of Westinghouse's argument is that Southwest's negligence and strict liability counts must stand or fall on Westinghouse's position that "consequential" damages or "economic losses" are not recoverable. Reference to textbook law quickly refutes this contention by Westinghouse:

> Where an item of personal property which has been used to produce profits has been injured, taken, or destroyed by the tortious conduct of the defendant, counts—in appropriate cases—allow a recovery for those profits which were lost during the time reasonably needed to repair or to replace the item.
> (22 Am.Jur.2d, Damages, § 176, p. 250)

There is no mistaking that the law generally, and specifically in Arizona, holds that a tort feasor is liable for all those damages which are natural and proximate results of the defendant's tortious conduct. See *Gila Water Co. v. Gila Land & Cattle Co.,* 30 Ariz. 569, 249 P. 751 (1926). Westinghouse, by urging that damages sought herein are "consequential" is asking the Court for a preliminary decision on what is "the natural and proximate result" of the defendant's tortious conduct. This is obviously a question to be decided by the trier of fact.

In *Seely v. White Motor Co.,* 63 Cal.2d 9, 45 Cal.Rptr.17, 403 P.2d 145 (1965), the dicta of which is relied upon so heavily by Westinghouse in support of its liability argument, the Court sustained the plaintiff's recovery of what Westinghouse terms "consequential" damages, ostensibly based on the theory of breach of express warranty. It is significant to note, however, that the award was based on a *tort* rule of damages, *i.e.,* those losses resulting directly and naturally in the ordinary course of events from the failure to repair. It is indeed, therefore, an inconsistent line of reasoning which on one hand supports the result in *Seely, supra,* in awarding economic loss under a breach of warranty theory, but on the other hand disclaims the applicability of the *Seely* rule of damages as utilized in tort actions, *i.e.,* negligence and strict liability.

Therefore, since under the tort rule of damages the type of loss which Southwest seeks to recover is capable of being recovered, and since the tort rule of damages is to be applied in a tort action, Southwest now directs its attention to whether a tort actions lies, or more correctly, whether Westinghouse has established that a tort action does not lie.

III. (B) Negligence.

Though the parties contracted in Pennsylvania, the damage occurred at Snowflake, Arizona. Westinghouse has heretofore argued that Arizona law was applicable to the tort aspects of the case. (See TR 1109). To then urge, as does Westinghouse, that *Asphaltic Enterprises, Inc. v. Baldwin-Lima-Hamilton Corporation,* 39 F.R.D. 574 (E.D.Pa.1966) and *Pipe Welding Supply Co., Inc. v. Gas Atmospheres, Inc.,* 201 F.Supp. 191 (E.D. Ohio, 1961) are inapplicable, is without merit. Obviously, Pennsylvania law does not apply to damage caused *in Arizona* by the negligent manufacture and the negligent failure of Westinghouse to repair the turbine generator. Liability for failure to repair is generally predicated upon principles of negligence. In 5A Frumer & Friedman, *Personal Injury: Actions-Defenses-Damages* § 101, the authors state at pp. 414-15:

> A person undertaking to make repairs must exercise reasonable care in doing so, and, although elements of contract as well as tort may be involved, liability is generally predicated upon charge of negligence, and determined according to the same principles of liability applicable in negligence actions generally.

As in tort actions, generally, liability for negligent repair or negligent failure to repair is governed by the law of the place of injury. See 5A Frumer & Freidman, *Personal Injury: Actions-Defenses-Damages,* § 108, p. 430.

Westinghouse attempts to misconstrue Southwest's position by contending that Southwest would now urge a tort obligation independent of the contractual relationship between the parties. This contention is unwarranted for the negligence claim, as set forth in Count One of Appellant's Amended Complaint (TR 777-78) and as clearly set forth in Appellant's Opening Brief at pp. 50-52, is an *ex delicto* action arising out of a duty imposed by law as a result of the contractual relationship between the parties. (See: *McClure v. Johnson,* 50 Ariz. 76, 69 P.2d 573 (1937) quoted at length in Appellant's Opening Brief, at pp. 50-51). The critical point ignored by Westinghouse is that while the contract created the relationship between the parties, the duty is one imposed by law, and tort rules are applicable to its breach and the resultant damages.

It is therefore submitted that Southwest's Amended Complaint (TR 777-78) stated a claim in negligence upon which relief is properly recoverable, the claim being in tort is properly governed by Arizona law, and the only premise upon which Westinghouse opposes this inescapable conclusion is in and of itself totally in error and, therefore, must fall with the argument advanced therefrom.

III. (C) Strict Liability.

Since Westinghouse concedes that strict liability is now the law of Arizona, Southwest addresses itself to the reasons advanced by Westinghouse why strict liability is not applicable in this instance.

Westinghouse is urging that the damages sustained by Southwest in the case at bar are not of the type contemplated by the doctrine.

Westinghouse would have the Court believe that Southwest relies "solely" on the dissenting opinion in *Seely, supra.* This assumption, of course, ignores Southwest's explicit reliance on *Santor v. A. and M. Karagheurian*, 44 N.J. 52, 207 A.2d 305 (1965), as set forth in Appellant's Opening Brief, p. 66. This assumption further ignores the historical refusal of the courts to draw such arbitrary distinctions in applying tort remedies, *i.e.,* actions predicated on intentionally or negligently tortious conduct do not—insofar as there is or is not liability—hinge upon the quantity or quality of damage, economic status of the plaintiff, or *modus operandi* of the actor.

Westinghouse argues that strict liability should not be adopted for the reason that the plaintiff is a large corporation with sizeable assets. This argument is without merit.

The doctrine of strict liability must certainly apply equally in personal injury and property damage of the type sustained by Southwest. The doctrine has been applied in cases involving tortious conduct factually similar to that of Westinghouse. In *Santor, supra,* the damages awarded consisted of so-called economic loss. More importantly, the *tort* rule of damages most certainly constitutes the measuring stick. Under the tort rule of damages, economic loss in a case like this is recoverable. But, once establishing that a cause of action is pleaded in strict liability the amount of damages to be awarded is a matter for the trier of fact to determine.

It is therefore respectfully submitted: Southwest has properly pleaded legally sustainable claims in both negligence and strict liability; Southwest has suffered substantial damages as a result of Westinghouse's tortious wrongdoing; Southwest should be entitled to proceed to trial on the facts; and no legally cogent reason has been advanced by Westinghouse as to why Southwest is not entitled to recovery on its negligence and strict liability counts.

IV. (A) Whether Westinghouse Has Shown That It Was Entitled to a Judgment as a Matter of Law Was Timely Presented and Is Properly Presented for Review When the Lower Court Granted a Summary Judgment.

Westinghouse has continually, despite a record which supports a contrary result, argued that Southwest has had its day in court and that this matter has been fully and completely litigated by the parties hereto. However, the trial of this case had only been pending 3 days when Westinghouse promptly renewed its motion for summary judgment. Certainly, under no circumstances can it be found that Southwest has had its day in court, or that a trial to the Court took place, because Westinghouse was merely advancing its renewed motion for summary judgment.

In addition to a finding by the Court that no genuine issue as to a material fact exists, the Court must also find as a matter of law, that the moving party is entitled to a judgment before a summary judgment can be granted. Southwest submits Westinghouse must show, as the moving party, not only that a genuine issue material fact was missing but also that they are entitled to a judgment as a matter of law. This, Westinghouse has not done because they have not shown as a matter of law that Southwest was not entitled to recover any damages whatsoever.

Westinghouse now attempts to take the position that Southwest has untimely presented a question of law which would definitely render the granting of a summary judgment to Westinghouse in appropriate. Westinghouse would now have this Court find that since they posed an interrogatory to Southwest asking Southwest to itemize its consequential damages and further, since Southwest responded and characterized all of its damages as consequential, then all of the damages of Southwest must in fact be as a matter of law consequential damages. Additionally, they pounce on the statement of Southwest's prior counsel wherein he stated, "they [the damages] obviously are consequential and have been all along" (TP, 8/1/67, p.21; Appellee's Brief, p. 51).

As held in the case of *Daugaard v. Hawkeye Security Insurance Company,* 239 F.2d 351 (8th Cir. 1956), a concession by counsel in the Lower Court is not binding on an appeal.

Therefore, it is respectfully submitted that whether or not Westinghouse was entitled to a judgment as a matter of law is properly presented for review when the Lower Court granted a motion for summary judgment in favor of Westinghouse.

IV. (B) Westinghouse Has Not Shown That It Is Entitled to a Judgment as a Matter of Law Because Westinghouse Has Not Shown as a Matter of Law That Southwest Was Not Entitled to Recover Any Damages Whatsoever.

Rule 56(c) of the Federal Rules of Civil Procedure provides in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavit, if any, show that there is no genuine issue as to any material fact *and that the moving party is entitled to a judgment as a matter of law.* (Emphasis added).

Westinghouse, by its own mathematical computations, has shown that it is not entitled to a judgment as a matter of law. Westinghouse, on p. 54 of its brief, has conveniently provided mathematical computations wherein it was unable to account for the entire amount of damages sought by Southwest. Westinghouse stated:

> That leaves the claim for alleged repair which is a mere $2,300 out of a claim of approximately $2,530,000. *Assuming the repair expenses fell within the definition of incidental damages, no one would have considered trying this case for that claim, even if Southwest had then claimed those damages were incidental and even if the court would have relieved Southwest of all its avowals and stipulations that all its damages were consequential.* The repair claim was not in the minds of the parties at all. (Emphasis added).

The Court, in *Willred Company v. Westmoreland Metal Mfg. Co.,* 200 F.Supp. 59 (E.D.Pa. 1961) in deciding a case under the *UCC* as adopted in Pennsylvania, specifically held that the costs of having a defective product repaired, along with travel expenses

incurred by its repairmen in the field, were specifically recoverable as incidental damages under § 2-715 of the *UCC*. Also, § 2-719 of the *UCC* does not provide for the limitation or exclusion of incidental damages.

Even though prior counsel for Southwest may have been under the misapprehension that all the damages recoverable by Southwest were consequential damages, this will not bind Southwest on this appeal. (See *Daugaard v. Hawkeye Security Insurance Company,* 239 F.2d 351 (8th Cir. 1956)).

Therefore, it is respectfully submitted that a portion, if not all, of the damages which are sought by Southwest are incidental damages as defined in § 2-715 of the *UCC*. Consequently, Westinghouse has not shown that it was entitled to a judgment as a matter of law because it has failed to establish that Southwest was not entitled to recover any damages whatsoever.

V. A Seller Who Has Not Disclaimed Express and Implied Warranties Should Not Be Allowed to Negate the Availability of Recovery for the Breach of Such Express or Implied Warranties by Merely Restricting the Damages and Remedies of the Buyer Without Complying with the Precise Requirements for Disclaimer of Express and Implied Warranties as Provided for in the UCC.

Can a seller under the *UCC,* as was done by Westinghouse in the case at bar, grant to a buyer any number of express warranties and the implied warranties of fitness and merchantibility, and in a complete reversal in one sweeping clause, negate any recovery by buyer without first disclaiming and disclosing the availability of the buyer's remedies in the same and precise manner as is required to disclaim express and implied warranties under the *UCC*? If this be the purpose and intent of the *UCC,* then Southwest submits there is an irreconcilible conflict in the provisions of the Code itself, which are inconsistent in logic and reason.

Therefore, it is respectfully submitted that if the *UCC* is to hold, a seller must do certain things in a precise and specific manner to disclaim express warranties and implied warranties of fitness and